with the manner in which such amounts were actually deferred under Plan S and Plan T.

Example 8. (i) Employer X sponsors Plan P, which provides for matching contributions equal to 50% of elective deferrals that do not exceed 10% of compensation. Elective deferrals for highly compensated employees are limited, on a payroll-by-payroll basis, to 10% of compensation. Employer X pays employees on a monthly basis. Plan P also provides that elective contributions are limited in accordance with section 401(a)(30) and other applicable statutory limits. Plan P also provides for catch-up contributions. Under Plan P, for purposes of calculating the amount to be treated as catch-up contributions (and to be excluded from the ADP test), amounts in excess of the 10% limit for highly compensated employees are determined at the end of the plan year based on compensation used for purposes of ADP testing (testing compensation), a definition of compensation that is different from the definition used under the plan for purposes of calculating elective deferrals and matching contributions during the plan year (deferral compensation).

(ii) Participant A, a highly compensated employee, is a catch-up eligible participant under Plan P with deferral compensation of $10,000 per monthly payroll period. Participant A defers 10% per payroll period for the first 10 months of the year, and is allocated a matching contribution each payroll period of $500. In addition, Participant A defers an additional $4,000 during the first 10 months of the year. Participant A then reduces deferrals during the last 2 months of the year to 5% of compensation. Participant A is allocated a matching contribution of $250 for each of the last 2 months of the plan year. For the plan year, Participant A has $15,000 in elective deferrals and $5,500 in matching contributions.

(iii) A's testing compensation is $118,000. At the end of the plan year, based on 10% of testing compensation, or $11,800, Plan P determines that A has $3,200 in deferrals that exceed the 10% employer provided limit. Plan P excludes $3,200 from ADP testing and calculates A's ADR as $11,800 divided by $118,000, or 10%. Although A has not been allocated a matching contribution equal to 50% of $11,800, because Plan P provides that matching contributions are calculated based on elective deferrals during a payroll period as a percentage of deferral compensation, Plan P is not required to allocate an additional $400 of matching contributions to A.

(i) *Effective date*—(1) *Statutory effective date.* Section 414(v) applies to contributions in taxable years beginning on or after January 1, 2002.

(2) *Regulatory effective date.* Paragraphs (a) through (h) of this section apply to contributions in taxable years beginning on or after January 1, 2004.

[T.D. 9072, 68 FR 40515, July 8, 2003]

§ 1.414(w)–1 Permissible withdrawals from eligible automatic contribution arrangements.

(a) *Overview.* Section 414(w) provides rules under which certain employees are permitted to elect to make a withdrawal of default elective contributions from an eligible automatic contribution arrangement. This section sets forth the rules applicable to permissible withdrawals from an eligible automatic contribution arrangement within the meaning of section 414(w). Paragraph (b) of this section defines an eligible automatic contribution arrangement. Paragraph (c) of this section describes a permissible withdrawal and addresses which employees are eligible to elect a withdrawal, the timing of the withdrawal election, and the amount of the withdrawal. Paragraph (d) of this section describes the tax and other consequences of the withdrawal. Paragraph (e) of this section includes the definitions applicable to this section.

(b) *Eligible automatic contribution arrangement*—(1) *In general.* An eligible automatic contribution arrangement is an automatic contribution arrangement under an applicable employer plan that is intended to be an eligible automatic contribution arrangement for the plan year and that satisfies the uniformity requirement under paragraph (b)(2) of this section, and the notice requirement under paragraph (b)(3) of this section. An eligible automatic contribution arrangement need not cover all employees who are eligible to elect to have contributions made on their behalf under the applicable employer plan.

(2) *Uniformity requirement*—(i) *In general.* An eligible automatic contribution arrangement must provide that the default elective contribution is a uniform percentage of compensation.

(ii) *Exception to uniform percentage requirement.* An arrangement does not violate the uniformity requirement of paragraph (b)(2)(i) of this section merely because the percentage varies in a manner that is permitted under §1.401(k)–3(j)(2)(iii), except that the

rule of §1.401(k)–3(j)(2)(iii)(B) is applied without regard to whether the arrangement is intended to be a qualified automatic contribution arrangement.

(iii) *Rules of application.* For purposes of this paragraph (b)(2), all automatic contribution arrangements that are intended to be eligible automatic contribution arrangements within a plan (or within the disaggregated plan under §1.410(b)–7, in the case of a plan subject to section 410(b)) are aggregated. Thus, for example, if a single plan within the meaning of section 414(l) covering employees in two separate divisions has two different automatic contribution arrangements that are intended to be eligible automatic contributions arrangements, the two automatic contribution arrangements can constitute eligible automatic contribution arrangements only if the default elective contributions under the arrangements are the same percentage of compensation. However, if the different automatic contribution arrangements cover employees in portions of the plan that are mandatorily disaggregated under the rules of section 410(b), then there is no requirement to aggregate those automatic contribution arrangements under the uniformity requirements of this paragraph (b)(2).

(3) *Notice requirement*—(i) *General rule.* The notice requirement of this paragraph (b)(3) is satisfied for a plan year if each covered employee is given notice of the employee's rights and obligations under the arrangement. The notice must be sufficiently accurate and comprehensive to apprise the employee of such rights and obligations, and be written in a manner calculated to be understood by the average employee to whom the arrangement applies. The notice must be in writing; however, see §1.401(a)–21 for rules permitting the use of electronic media to provide applicable notices.

(ii) *Content requirement.* The notice must include the provisions found in §1.401(k)–3(d)(2)(ii) to the extent those provisions apply to the arrangement. A notice is not considered sufficiently accurate and comprehensive unless the notice accurately describes—

(A) The level of the default elective contributions which will be made on the employee's behalf if the employee does not make an affirmative election;

(B) The employee's rights to elect not to have default elective contributions made to the plan on his or her behalf or to have a different percentage of compensation or different amount of contribution made to the plan on his or her behalf;

(C) How contributions made under the arrangement will be invested in the absence of any investment election by the employee; and

(D) The employee's rights to make a permissible withdrawal, if applicable, and the procedures to elect such a withdrawal.

(iii) *Timing*—(A) *General rule.* The timing requirement of this paragraph (b)(3)(iii) is satisfied if the notice is provided within a reasonable period before the beginning of each plan year or, in the plan year the employee is first eligible to make a cash or deferred election (or first becomes covered under the automatic contribution arrangement as a result of a change in employment status), within a reasonable period before the employee becomes a covered employee. In addition, a notice satisfies the timing requirements of paragraph (b)(3) of this section only if it is provided sufficiently early so that the employee has a reasonable period of time after receipt of the notice in order to make the election described under paragraph (e)(2)(i) or (e)(2)(ii) of this section.

(B) *Deemed satisfaction of timing requirement.* The timing requirement of this paragraph (b)(3)(iii) is satisfied if at least 30 days (and no more than 90 days) before the beginning of each plan year, the notice is given to each employee covered under the automatic contribution arrangement for the plan year. In the case of an employee who does not receive the notice within the period described in the previous sentence because the employee becomes eligible to make a cash or deferred election (or becomes covered under the automatic contribution arrangement as a result of a change in employment status) after the 90th day before the beginning of the plan year, the timing requirement is deemed to be satisfied if the notice is provided no more than 90

days before the employee becomes eligible to make a cash or deferred election (or becomes covered under the automatic contribution arrangement as a result of a change in employment status), and no later than the date that affords the employee a reasonable period of time after receipt of the notice to make the election described under paragraph (e)(2)(i) or (e)(2)(ii) of this section. If it is not practicable for the notice to be provided on or before the date specified in the plan that an employee becomes eligible to make a cash or deferred election, the notice will nonetheless be treated as provided timely if it is provided as soon as practicable after that date and the employee is permitted to elect to defer from all types of compensation that may be deferred under the plan earned beginning on that date.

(c) *Permissible withdrawal*—(1) *In general.* If the plan so provides, any employee who has default elective contributions made under the eligible automatic contribution arrangement may elect to make a withdrawal of such contributions (and earnings attributable thereto) in accordance with the requirements of this paragraph (c). An applicable employer plan that includes an eligible automatic contribution arrangement will not fail to satisfy the prohibition on in-service withdrawals under section 401(k)(2)(B), 403(b)(7), 403(b)(11), or 457(d)(1) merely because it permits withdrawals that satisfy the timing requirement of paragraph (c)(2) of this section and the amount requirement of paragraph (c)(3) of this section.

(2) *Timing*—(i) *Last date to make election.* A covered employee's election to withdraw default elective contributions must be made no later than 90 days after the date of the first default elective contribution under the eligible automatic contribution arrangement and must be effective no later than the date set forth in paragraph (c)(2)(iii) of this section. A plan is permitted to set an earlier deadline for making this election, but if a plan provides that a covered employee may withdraw default elective contributions, then the election period for the covered employee must be at least 30 days.

(ii) *Determination of date of first default elective contribution.* For purposes of this paragraph (c)(2), the date of the first default elective contribution is the date that the compensation that is subject to the cash or deferred election would otherwise have been included in gross income.

(iii) *Latest effective date of the election.* The effective date of an election described in this paragraph (c)(2) cannot be after the earlier of—

(A) The pay date for the second payroll period that begins after the date the election is made; and

(B) The first pay date that occurs at least 30 days after the election is made.

(iv) *Special rules*—(A) *Treatment of periods without default elective contributions.* For purposes of determining the date of the first default elective contribution under the eligible automatic contribution arrangement, a plan is permitted to treat an employee who for an entire plan year did not have default elective contributions made under the eligible automatic contribution arrangement as if the employee had not had such contributions for any prior plan year as well.

(B) *Treatment relating to aggregation of arrangements.* The determination of whether an election is made no later than 90 days after the date of the first default elective contribution under the eligible automatic contribution arrangement must take into account any other eligible automatic contribution arrangement that is required to be aggregated with the eligible automatic contribution arrangement under the rules of paragraph (b)(2)(iii) of this section.

(3) *Amount and timing of distributions*—(i) *In general.* A distribution satisfies the requirement of this paragraph (c)(3) if the distribution is equal to the amount of default elective contributions made under the eligible automatic contribution arrangement through the effective date of the election described in paragraph (c)(2) of this section (adjusted for allocable gains and losses to the date of distribution). If default elective contributions are separately accounted for in the participant's account, the amount of the distribution will be the total amount in that account. However, if default

elective contributions are not separately accounted for under the plan, the amount of the allocable gains and losses will be determined under rules similar to those provided under §1.401(k)–2(b)(2)(iv) for the distribution of excess contributions.

(ii) *Fees.* The distribution amount as determined under this paragraph (c)(3) may be reduced by any generally applicable fees. However, the plan may not charge a higher fee for a distribution under section 414(w) than would apply to any other distributions of cash.

(iii) *Date of distribution.* The distribution must be made in accordance with the plan's ordinary timing procedures for processing distributions and making distributions.

(d) *Consequences of the withdrawal*—(1) *Income tax consequences*—(i) *Year of inclusion.* The amount of the withdrawal is includible in the eligible employee's gross income for the taxable year in which the distribution is made. However, any portion of the distribution consisting of designated Roth contributions is not included in an employee's gross income a second time. The portion of the withdrawal that is treated as an investment in the contract is determined without regard to any plan contributions other than those distributed as a withdrawal of default elective contributions.

(ii) *No additional tax on early distributions from qualified retirement plans.* The withdrawal is not subject to the additional tax under section 72(t).

(iii) *Reporting.* The amount of the withdrawal is reported on Form 1099–R, ''Distributions From Pensions, Annuities, Retirement or Profit-Sharing Plans, IRAs, Insurance Contracts, etc.,'' as described in the applicable instructions.

(iv) *Disregarded for purposes of section 402(g).* The amount of the withdrawal is not taken into account in determining the limitation on elective deferrals under section 402(g).

(2) *Forfeiture of matching contributions.* In the case of any withdrawal made under paragraph (c) of this section, employer matching contributions with respect to the amount withdrawn that have been allocated to the participant's account (adjusted for allocable gains and losses) must be forfeited. A plan is permitted to provide that employer matching contributions will not be made with respect to any withdrawal made under paragraph (c) of this section if the withdrawal has been made prior to the date as of which the match would otherwise be allocated.

(3) *Consent rules.* A withdrawal made under paragraph (c) of this section may be made without regard to any notice or consent otherwise required under section 401(a)(11) or 417.

(e) *Definitions.* Unless indicated otherwise, the following definitions apply for purposes of section 414(w) and this section.

(1) *Applicable employer plan.* An applicable employer plan means a plan that—

(i) Is qualified under section 401(a);

(ii) Satisfies the requirements of section 403(b);

(iii) Is a section 457(b) eligible governmental plan described in §1.457–2(f);

(iv) Is a simplified employee pension the terms of which provide for a salary reduction arrangement described in section 408(k)(6); or

(v) Is a SIMPLE described in section 408(p).

(2) *Automatic contribution arrangement.* An automatic contribution arrangement means an arrangement that provides for a cash or deferred election and which specifies that, in the absence of a covered employee's affirmative election, a default election applies under which the employee is treated as having elected to have default elective contributions made on his or her behalf under the plan. The default election begins to apply with respect to an eligible employee no earlier than a reasonable period of time after receipt of the notice describing the automatic contribution arrangement. This default election ceases to apply with respect to an eligible employee for periods of time with respect to which the employee has an affirmative election that is currently in effect to—

(i) Not have any default elective contributions made on his or her behalf; or

(ii) Have contributions made in a different amount or percentage of compensation.

(3) *Covered employee.* Covered employee means an employee who is covered under the automatic contribution

arrangement, determined under the terms of the plan. A plan must provide whether an employee who makes an affirmative election remains a covered employee. If a plan provides that an employee who makes an affirmative election described in paragraph (e)(2)(i) or (e)(2)(ii) of this section remains a covered employee, then the employee must continue to receive the notice described in paragraph (b)(3) of this section and the plan may be eligible for the excise tax relief with respect to excess amounts distributed within 6 months after the end of the plan year under section 4979(f)(1). Such an employee will also have the default election reapply if the plan provides that the employee's prior affirmative election no longer remains in effect and the employee does not make a new affirmative election.

(4) *Default elective contributions.* Default elective contributions means the contributions that are made at a specified level or amount under an automatic contribution arrangement in the absence of a covered employee's affirmative election that are—

(i) Contributions described in section 402(g)(3); or

(ii) Contributions made to an eligible governmental plan within the meaning of §1.457–2(f) that would be elective contributions if they were made under a qualified plan.

(f) *Effective/applicability date*—(1) *Statutory effective date.* Section 414(w) applies to plan years beginning on or after January 1, 2008.

(2) *Regulatory effective date.* This section applies to plan years beginning on or after January 1, 2010. For plan years that begin in 2008, a plan must operate in accordance with a good faith interpretation of section 414(w). For this purpose, a plan that operates in accordance with this section will be treated as operating in accordance with a good faith interpretation of section 414(w).

[T.D. 9447, 74 FR 8212, Feb, 24, 2009]

§1.415(a)–1 General rules with respect to limitations on benefits and contributions under qualified plans.

(a) *Trusts.* Under sections 415 and 401(a)(16), a trust that forms part of a pension, profit-sharing, or stock bonus plan will not be qualified under section 401(a) if any of the following conditions exists:

(1) In the case of a defined benefit plan, the annual benefit with respect to any participant for any limitation year exceeds the limitations of section 415(b) and §1.415(b)–1.

(2) In the case of a defined contribution plan, the annual additions credited with respect to any participant for any limitation year exceed the limitations of section 415(c) and §1.415(c)–1.

(3) The trust has been disqualified under section 415(g) and §1.415(g)–1 for any year.

(b) *Certain annuities and accounts*—(1) *In general.* Under section 415, an employee annuity plan described in section 403(a), an annuity contract described in section 403(b), or a simplified employee pension described in section 408(k) will not be considered to be described in the otherwise applicable section if any of the following conditions exists:

(i) The annual benefit under a defined benefit plan with respect to any participant for any limitation year exceeds the limitations of section 415(b) and §1.415(b)–1.

(ii) The contributions and other additions credited under a defined contribution plan with respect to any participant for any limitation year exceed the limitations of section 415(c) and §1.415(c)–1.

(iii) The employee annuity plan, annuity contract, or simplified employee pension has been disqualified under section 415(g) and §1.415(g)–1 for any year.

(2) *Special rule for section 403(b) annuity contracts.* If the contributions and other additions under an annuity contract that otherwise satisfies the requirements of section 403(b) exceed the limitations of section 415(c) and §1.415(c)–1 with respect to any participant for any limitation year (regardless of whether the annuity contract is a defined contribution plan or a defined benefit plan), then the portion of the contract that includes such excess annual addition fails to be a section 403(b) annuity contract, and the remaining portion of the contract is a section 403(b) annuity contract. However, the status of the remaining portion of the contract as a section 403(b) annuity